(3)

No. 92-56

Supreme Court, U.S.
FILED
SEP 10 1992
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

S&M CONSTRUCTORS, INC.,
Petitioner,

v.

THE FOLEY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner's Supplemental Brief

ROBERT J. ANDREWS, JR., *Counsel of Record*
ANDREWS & ASSOCIATES
4403 St. Clair Avenue
Cleveland, OH 44103
(216) 881-8030

and

CHARLES H. MANNING
ANDREWS & ASSOCIATES
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 881-8030
Counsel for Petitioner

22pp

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TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF

Petitioner, S&M Constructors, Inc., submits this Brief to supplement its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. As noted in its Petition, the United States Court of Appeals for the Eighth Circuit denied Petitioner's motion for a stay of arbitration pending appeal in its opinion dated March 16, 1992 as set forth in Petitioner's Appendix at page A-1.

On March 18, 1992, Petitioner filed a Motion in the United States Court of Appeals for the Eighth Circuit to stay enforcement of the Court's decision pending an application to the United States Supreme Court for a Petition for Writ of Certiorari. The United States Court of Appeals denied Petitioner's Motion in its decision issued March 27, 1992.

Subsequently, the American Arbitration Association rescheduled the arbitration between Petitioner S&M Constructors, Inc. and Respondent The Foley Company for March 31, 1992. On March 30, 1992, prior to the commencement of the rescheduled arbitration between Petitioner and Respondent, Petitioner filed a Voluntary Petition in the United States Bankruptcy Court for the Northern District of Ohio under Chapter 11 of the Bankruptcy Code, Case No. 92-11872, which case is still pending. (The Voluntary Petition in Bankruptcy of S&M Constructors is reprinted in the Appendix.)

Pursuant to the automatic stay provisions of 11 U.S.C. §362, the scheduled arbitration between Petitioner and Respondent has been stayed during the pendency of Petitioner's Chapter 11 bankruptcy proceeding. Consequently, the parties have not commenced arbitration so as to render this Court's review of

Petitioner S&M Constructors, Inc. Petition for Writ of Certiorari moot.

Respectively submitted,
ROBERT J. ANDREWS, JR.
Counsel of Record

CHARLES H. MANNING
ANDREWS & ASSOCIATES
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 881-8030
Counsel for Petitioner

Chapter 11 92-11872

United States Bankruptcy Court Northern District of Ohio Eastern Division	VOLUNTARY PETITION
In re: S & M Constructors, Inc. An Ohio Corporation	Name of Joint Debtor
All other names used by the debtor in the last 6 years NONE	All other names used by the joint debtor in the last 6 years
Soc. Sec.#/TAX I.D.# 34-0941329	Soc. Sec.#/TAX I.D.#
Street address of debtor 29100 Hall St. Solon, Ohio 44139 County of Residence or business Cuyahoga	Street address of Joint Debtor County of Residence or Business
Mailing address of Debtor SAME	Mailing Address of Joint Debtor
Business Debtor's Principal Asset Location SAME	Venue [X] Debtor's domicile, residence, or business assets were in this District for the 180 days preceding this petition
INFORMATION REGARDING DEBTOR	Chapter/Section [X] Chapter 11 Filing Fee: [X] Attached
Debtor Type: [X] Corporation Not Public Debt Nature: [X] Business A. Business Type: [X] Construction B. Briefly describe nature of business Construction of underground tunnels	Name and address of law firm or attorney Irving S. Bergrin 1600 East Ohio Building Cleveland, Ohio 44114 Bar No. 0010100 Telephone No. (216) 579-4224 Attorney(s) representing debtor Irving S. Bergrin [ ] Debtor not represented by attorney
Statistical Administrative Information (28 U.S.C. 604) [X] Funds will not be available for unsecured creditors Estimated No. of Creditors: [X] 16-49 Estimated Assets (thousands): [X] Under 50 Estimated Liabilities (thousands): [X] 500-999 Estimated no. of Employees: [X] 0 Estimated Equity of Security Holders: [X] 0	This space for Court Use JUDGE SNOW RELIEF ORDERED Time stamped March 30, 1992

Debtor: S & M Constructors, Inc., an Ohio Corporation Case No. _____

FILING OF PLAN

For Chapter 9, 11, 12 and 13 cases only. [X] Debtor intends to file plan within time allowed.

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS

Location Where Filed	Case Number	Date Filed
NONE		

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER, OR AFFILIATE OF THE DEBTOR

Name of Debtor	Case Number	Date
NONE		
Relationship	District	Judge

REQUEST FOR RELIEF

Debtor requests relief under the U.S. Code title 11 chapter specified in this petition.

SIGNATURES

Attorney

X /s/ IRVING S. BERGRIN Date: 3-24-92
Attorney: Irving S. Bergrin

JOINT DEBTORS	CORPORATE OR PARTNERSHIP DEBTOR
We declare under penalty of perjury that the information provided in this petition is true and correct X _____ Debtor: Date: X _____ Joint Debtor: Date:	I declare under penalty of perjury that the information in this petition is true and correct and that the filing of this petition on behalf of the debtor has been authorized. X /s/ RONAN MARRA Signature of Authorized Individual Name: Ronan Marra Title: Vice President Date: 3-24-92

EXHIBIT "A"

[X] Exhibit "A" is attached and made part of this petition.

TO BE COMPLETED BY INDIVIDUAL CHAPTER 7 DEBTOR WITH PRIMARILY CONSUMER DEBTS (See P. L. 98-353 S322)

I am aware that I may proceed under Chapter 7, 11, or 12, or 13 of title 11, U.S. Code understand the relief available under such chapter, and choose to proceed under chapter 7 of such title. If I am represented by an attorney Exhibit "B" has been completed.

EXHIBIT "B"

I, the attorney for the debtor(s) named in the foregoing petition, declare that I have informed the debtor(s) that (he, she, or they) may proceed under chapter 7, 11, 12, or 13 of title 11, U.S. Code, and have explained the relief available under such chapter.

X _____ Date:

In re: S & M Constructors, Inc., an Ohio Corporation/Debtor
Case No.

SCHEDULE D — CREDITORS HOLDING SECURED CLAIMS

Creditor Name and Address	Date, Nature of Lien, Description & Value	Claim Amount	Unsecured Portion and Notes*

[X] Debtor has no creditors holding secured claims to report on this Schedule D.

In re: S & M Constructors, Inc., an Ohio Corporation/Debtor
Case No.

SCHEDULE E — CREDITORS HOLDING UNSECURED PRIORITY CLAIM
PRIORITY TYPE: Taxes and Certain Other Debts Owed to Governmental Units

Creditor Name and Address	Claim Date and Consideration	Claim Amount	Amount with Priority and Notes*
1. Account No. Francis Gaul, County Treasurer Real Property Tax 1219 Ontario St. Cleveland, OH 44113		Unknown	Unknown

Continuation sheet no. 1 of 1

Subtotal: $ 0.00
Total: $ 0.00

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE E — CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

[ ] Debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY

[ ] Extensions of credit in an involuntary case
Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or for the order relief. 11 U.S.C. S507(a)(2).

[ ] Wages, salaries and commissions
Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000.00 per employee, earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. S507(a)(3).

[ ] Contributions to employee benefit plans
Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. S507(a)(4).

[ ] Certain farmers and fishermen
Claims of certain farmers and fishermen, up to a maximum of $2000 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. S507(a)(5).

[ ] Deposits by individuals
Claims of individuals up to a maximum of $900 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. S507(a)(6).

[X] Taxes and Other Certain Debts Owed to Governmental Units
Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. S507(a)(7).

1 Continuation sheet attached

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE F — CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

	Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*
1.	Account No. Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020	Misc.	$ 69,700.00
2.	Account No. Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020	Misc.	$182,000.00
3.	Account No. Al Mathews Corporation P.O. Box 4039 Federal Way, WA 98063	Misc.	$ 3,651.04
4.	Account No. American Arbitration Assn. 140 West 51st Street New York, NY 10020-1203	Misc.	$ 5,681.62
5.	Account No. Andrews & Associates 4403 St. Clair Cleveland, OH 44103-1125	None	$161,270.14
6.	Account No. Arnold L. Cornez 333 W. Maude Avenue, Suite 101 Sunnyvale, CA 94086	None	$ 1,457.00
7.	Account No. Arthur Andersen & Co. 1717 East Ninth Street Cleveland, OH 44114	None	$106,125.00
8.	Account No. Bell Atlantic Tricon Leasing P.O. Box 911 Paramus, NJ 07653	None	$ 387.30
		Subtotal:	$530,272.10

2 continuation sheets attached

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE F — CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS — (Continuation Sheet)

	Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*
9.	Account No. Britton Gallagher Insurance Ag 6240 SOM Center Road Cleveland, OH 44139	Credit card purchases	$ 31,249.00
10.	Account No. Burke, Rosen & Associates 2800 Euclid Avenue Cleveland, OH 44115	None	$ 1,675.00
11.	Account No. Commonwealth of Pennsylvania Office of Attorney General 15th Floor, Strawberry Square Harrisburg, PA 17120	None	$ 61,843.00
12.	Account No. D. L. George & Sons, Inc. 13321 Midvale Road Waynesboro, PA 17268	None	$ 62,753.12
13.	Account No. Frank I. Ciminelli Construction The Cyclorama Building 369 Franklin Street Buffalo, NY 14202-1790	None	$ 65,000.00
14.	Account No. 219-3138-85090 GMAC 24700 Chagrin Blvd. Beachwood, OH 44122	None	$ 2,110.07
15.	Account No. Hall Street Enterprise Company 29100 Hall Street Solon, OH 44139	None	$ 58,500.00
16.	Account No. J. A. Blanck Co. 1300 Watervale Road Fellston, MD 21047	None	$ 38,395.96
		Subtotal:	$321,526.15

In re: S & M Constructors, Inc., an Ohio Corporation /Debtor
Case No.

SCHEDULE F — CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS — (Continuation Sheet)

	Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount and Notes*
17.	Account No. Jacobs Associates 500 Sansome San Francisco, CA 94111	None	$ 8,560.21
18.	Account No. Lachel & Associates, Inc. P.O. Box 4039 Golden, CO 80401	None	$ 6,884.56
19.	Account No. Lakeshore Mining Equipment Co. 4106 Earmoor Road Louisville, KY 40218	None	$ 8,961.16
20.	Account No. Longano Consultants, Inc. 4405 St. Clair Cleveland, OH 44103-1125	None	$ 3,227.20
21.	Account No. S. H. Bartholomew, Inc. P.O. Box 3360 Chico, CA 95927-3360	None	$ 8,458.82
		Subtotal:	$ 36,091.95
		Total:	$887,890.20

Sheet no. 2 of 2

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re *S & M Constructors, Inc., an Ohio Corporation* Case No.
Chapter 11
_____/Debtor

Attorney for Debtor: Irving S. Bergrin

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS

Following is a list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P 1007(d) for filing in this chapter 11 [or chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. 101(30), or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims.

Creditor & Contact	Nature of Claim	Amount of Claim
Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020 Phone:	Misc.	$182,000.00
Andrews & Associates 4403 St. Clair Cleveland, OH 44103-1125 Phone:	None	$161,270.14
Arthur Andersen & Co. 1717 East Ninth Street Cleveland, OH 44114 Phone:	None	$106,125.00
Aetna Casualty & Surety Co. 151 Farmington Avenue Hartford, CT 06156-2020 Phone:	Misc.	$ 69,700.00
Frank I. Ciminelli Construction The Cyclorama Building 369 Franklin Street Buffalo, NY 14202-1790 Phone:	None	$ 65,000.00

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS

Creditor & Contact	Nature of Claim	Amount of Claim
D. L. George & Sons, Inc. 13321 Midvale Road Waynesboro, PA 17268 Phone:	None	$ 62,753.12
Commonwealth of Pennsylvania Office of Attorney General 15th Floor, Strawberry Square Harrisburg, PA 17120 Phone:	None	$ 61,843.00
Hall Street Enterprise Company 29100 Hall Street Solon, OH 44139 Phone:	None	$ 58,500.00
J. A. Blanck Co. 1300 Watervale Road Fellston, MD 21047	None	$ 38,395.96
Britton Gallagher Insurance 6240 SOM Center Road Cleveland, OH 44139	Credit card purchases	$ 31,249.00
Lakeshore Mining Equipment Co. 4106 Earmoor Road Louisville, KY 40218 Phone:	None	$ 9,961.16
Jacobs Associates 500 Sansome San Francisco, CA 94111 Phone:	None	$ 8,560.21

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS

Creditor & Contact	Nature of Claim	Amount of Claim
S. H. Bartholomew, Inc. P.O. Box 3360 Chico, CA 95927-3360 Phone:	None	$ 8,458.82
Lachel & Associates, Inc. P.O. Box 4039 Golden, CO 80401 Phone:	None	$ 6,884.56
American Arbitration Assn. 140 West 51st Street New York, NY 10020-1203 Phone:	Misc.	$ 5,681.62
Al Mathews Corporation P.O. Box 4039 Federal Way, WA 98063 Phone:	Misc.	$ 3,651.04
Longano Consultants, Inc. 4403 St. Clair Cleveland, OH 44103-1125 Phone:	None	$ 3,227.20
GMAC 24700 Chagrin Blvd. Beachwood, OH 44122 Phone:	None	$ 2,110.07
Burke, Rosen & Associates 2800 Euclid Avenue Cleveland, OH 44115 Phone:	None	$ 1,675.00
Arnold L. Cornez 333 W. Maude Avenue, Suite 101 Sunnyvale, CA 94086 Phone:	None	$ 1,457.00

LIST OF CREDITORS HOLDING TWENTY LARGEST UNSECURED CLAIMS
(Continuation Sheet)

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION

I, Ronan Marra, Vice President of the Corporation named as debtor in this case, declare under penalty of perjury that I have read the foregoing List of Creditors Holding Twenty Largest Unsecured Claims and that it is true and correct to the best of my knowledge, information and belief.

Date _____

Signature /s/ RONAN MARRA
Ronan Marra, *Vice President*

Penalty for making a false statement or concealing property. Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. SS 152 and 3571.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re *S & M Constructors, Inc.,*	*Case No.*
an Ohio Corporation	Chapter 11
	/Debtor

Attorney for Debtor: Irving S. Bergrin

STATEMENT Pursuant to Rule 2016 (b)

The undersigned, pursuant to Rule 2016(b), Rules of Bankruptcy Procedure, states that:

1. The compensation paid or promised by the Debtor(s), to the undersigned, is as follows:

For legal services rendered, Debtor(s) agrees to pay	$ 155.00 per hour
Prior to the filing of this Statement, Debtor(s) has paid	4,500.00
Balance due	unknown

2. The Filing Fee *has been paid.*

3. The Services rendered or to be rendered include the following:

   (a) Analysis of the financial situation, and rendering advice and assistance to the client in determining whether to file a petition under Title 11, U. S. C.

   (b) Preparation and filing of the petition, schedules, statement of affairs and other documents required by the court.

   (c) Representation of the client at the first meeting of creditors.

4. The source of payments made by the debtor(s) to the undersigned was from earnings, wages and compensation for services performed, and none other.

5. The source of payments to be made by the debtor(s) to the undersigned for the unpaid balance remaining, if any, will be from earnings, wages and compensation for services performed, and none other.

6. The undersigned has received no transfer, assignment or pledge of property from the debtor(s) except the following for the value stated: None.

7. The undersigned has not shared or agreed to share with any other entity, other than with members of the undersigned's law firm, any compensation paid or to be paid except as follows: None.

Dated: 3-24-92

Respectfully submitted,

/s/ IRVING S. BERGRIN

Attorney for Petitioner:
Irving S. Bergrin
1600 East Ohio Building
Cleveland, Ohio 44114
Bar No. 00010100

S & M CONSTRUCTORS, INC.

The following Resolutions are hereby adopted in connection with the filing of a Chapter 11 petition, to be filed on February 25, 1992:

RESOLVED, that the Directors unanimously agree that a filing of a Chapter 11 petition is in the best interest of the corporation considering the current financial situation.

RESOLVED FURTHER, that the officers of the company, specifically Ronan Marra, Vice President and Victor Scaravilli, President, be, and each of them hereby is, authorized and empowered to execute on behalf of the company all documents necessary for the filing of said Chapter 11 petition.

RESOLVED FURTHER, that the officers of the company, as named above, be, and each of them hereby is, authorized to execute any and all related instruments, documents, agreements, and certificates, that the said officers deem to be appropriate in connection with the Chapter 11 proceedings.

RESOLVED FURTHER, that the officers of the company, as named above, be, and each of them hereby is, authorized to take all other actions that the officers deem to be appropriate in connection with the Chapter 11 proceedings.

CERTIFICATE AS TO ADOPTION OF RESOLUTION
BY
THE DIRECTORS
OF
S & M CONSTRUCTORS, INC.
(the "Company")
ON
February 24, 1992
(date of adoption)

° ° °

The undersigned certifies that he is the Assistant Secretary of the Company and that a resolution, of which the attached is a true and correct copy, was duly adopted by the Directors of the Company on the above date and is now in full force and effect as shown by the corporate records of the Company.

IN WITNESS WHEREOF, I have hereunto set my hand on February 24, 1992.

/s/ RONAN MARRA
Ronan Marra, Assistant Secretary
S & M Constructors, Inc.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re *S & M Constructors, Inc.,*
an Ohio Corporation — *Case No.*
Chapter 11
/Debtor

Attorney for Debtor: Irving S. Bergrin

Exhibit "A" to Voluntary Petition

1. Debtor's employer identification number is 34-0941329.

2. If any of the debtor's securities are registered under section 12 of the Securities and Exchange Act of 1934, the SEC file number is None.

3. The following financial data is the latest available information and refers to debtor's condition on 2-24-92.

a. Total assets		$ 0
b. Total liabilities		$887,890
		Approximate number of holders
Fixed, liquidated secured debt	$ 0	None
Contingent secured debt	$ 0	None
Disputed secured claims	$ 0	None
Unliquidated secured debt	$ 0	None
		Approximate number of holders
Fixed, liquidated unsecured debt	$887,890	22
Contingent unsecured debt	$ 0	None
Disputed unsecured claims	$ 0	None
Unliquidated unsecured debt	$ 0	None
		Approximate number of holders
Number of shares of preferred stock	$ None	None
Number of shares of common stock	$ 250	5

EXHIBIT "A" CONTINUED

Comments, if any:

4. Brief description of debtor's business:

Construction of underground tunnels

5. List the name of any person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the voting securities of debtor:

Victor Scaravilli (125 shares)
Anthony J. Marra (60.5 shares)
Angelo J. Marra (62.5 shares)

6. List the names of all corporations 20% or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by debtor: